(9)

Supreme Court, U.S.
FILED
JUL 17 1996
CLERK

No. 95-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia Circuit

---

REPLY BRIEF FOR APPELLANTS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL

Of Counsel:

JUDITH A. MCHALE
MARK HOLLINGER
DIANE L. HOFBAUER
DISCOVERY COMMUNICATIONS, INC.
7700 Wisconsin Avenue
Bethesda, MD 20814
(301) 986-1999

ALBERT G. LAUBER, JR. *
PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE, CHTD.
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
(202) 862-5000

* *Counsel of Record*

July 17, 1996

PRESS OF BYRON S. ADAMS ♦ WASHINGTON, D.C. ♦ 1-800-347-8208

20 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I. "SWITCH-AND-ANTENNA" CAPABILITY IS A CONSTITUTIONALLY ACCEPTABLE, LESS RESTRICTIVE ALTERNATIVE TO A MUST-CARRY REGIME 1

A. Practical Experience and Expert Testimony Confirm that A/B Switches Are Inexpensive, Easy To Install, And Convenient To Use 5

B. Installation And Use Of Receiving Antennas Entail No Significant Cost Or Inconvenience .. 9

II. SECTION 5 OF THE ACT, CONFERRING MUST-CARRY RIGHTS ON PUBLIC BROADCASTERS, IS UNCONSTITUTIONAL 12

A. The Public Broadcasters Have Not Shown A Substantial Governmental Interest 12

B. Section 5 Is Not Narrowly Tailored 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987) 5

Denver Area Educational Telecommunications Consortium v. FCC, 64 U.S.L.W. 4706 (June 25, 1996) 3, 4, 6

Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 4,11,12

CONSTITUTION, STATUTES, & REGULATIONS:

U.S. Const., Amend. I ..... *passim*

47 C.F.R. § 25.104 (1986) 10

47 C.F.R. §§ 73.621(d)-(e) 14

47 U.S.C. §§ 534(b)(3), 534(b)(10), 535(g) and 535 (i)(1) 14

47 U.S.C. § 544a(c) 14

H.R. Rep. No. 628, 102d Cong., 2d Sess. 73 (1992) .. 12

MISCELLANEOUS:

Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 2 FCC Rcd. 3593 ¶ 51 (1987) 8

Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59 (Apr. 27, 1995) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-992

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

REPLY BRIEF FOR APPELLANTS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL

ARGUMENT

I. "SWITCH-AND-ANTENNA" CAPABILITY IS A CONSTITUTIONALLY ACCEPTABLE, LESS RESTRICTIVE ALTERNATIVE TO A MUST-CARRY REGIME

The essential premise of appellees' defense of must-carry is that a cable system's decision not to carry a broadcast station *denies* or *deprives* that station of access to the system's subscribers. *E.g.*, Govt. Br. 28; NAB Br. 15. In our opening

brief (at 24-28), we showed that Judge Williams was correct in terming this premise "completely unfounded." J.S. App. 41a. Any cable subscriber can view any television station not carried on her cable system to the same extent the station's signal would be viewable if she did not subscribe to cable. In order to watch such non-carried broadcasters, the subscriber simply needs an inexpensive input-selector ("A/B") switch and whatever type of receiving antenna (indoor or outdoor) is used by neighboring non-cable households. As Judge Williams explained (J.S. App. 41a), the evidence overwhelmingly demonstrates that

> Every cable household can secure as good access to over-the-air television as it had before adopting cable simply by (1) retaining or acquiring the sort of antennae that the uncabled 40% of households necessarily use, and (2) operating either an input selector switch on their "remote" or an "A/B" switch that can be acquired at a local hardware store for a trivial sum.

The Government concedes that Judge Williams is correct "theoretically." Govt. Br. 41. But it contends that "[c]onsumers will not use A/B switches and outdoor antennas to watch over-the-air signals on their cable-wired sets, because of expense, complexity, and inconvenience" (*id.* at 11, 41). We demonstrate below that Congress had no substantial evidence to support any such finding. But even if appellees' rejoinder were correct, their concession about the technical workability of A/B switches sheds important light on the "governmental interest" actually at stake here.

Throughout this litigation, the Government has asserted a substantial interest in preserving viewers' access to free broadcast television. But the Government concedes that cable operators cannot *prevent* viewers from watching any television station that they wish to see and is available over-the-air. Broadcasters have, apart from cable, a wholly separate route

into cable subscribers' homes — the route they used universally before cable existed, and the route by which they now reach the 36 million U.S. households that rely solely on antennas to watch television. As Justice Breyer explained for the plurality in *Denver Area Educational Telecommunications Consortium v. FCC*, 64 U.S.L.W. 4706, 4711 (June 25, 1996):

> In fact, the power of cable systems to control home program viewing is not absolute. Over-the-air broadcasting and direct broadcast satellites already provide alternative ways for programming to reach the home, and are likely to do so to a greater extent in the near future.

If anything "prevents" cable subscribers from viewing local broadcasts, it is not the cable operator's veto. Rather it is, according to the Government, cable subscribers' alleged ignorance and diffidence — their supposed reluctance to expend the modest amounts of energy and money needed to regain the same off-air reception capacity that they necessarily possessed before subscribing to cable.

We may assume that the Government hypothetically has a legitimate interest in preventing monopolists from erecting insurmountable obstacles to consumers' receipt of certain communications. But that interest is not remotely implicated here. Confronted with the evidence on remand, the Government agrees that non-carriage by a cable system does not *deny broadcaster access* to that system's subscribers. Instead, the Government justifies mandatory carriage on the theory that it *facilitates broadcaster access* to cable subscribers by rendering it unnecessary for them to incur whatever inconvenience may be involved in acquiring antennas and A/B switches. We know of no authority for the proposition that avoiding modest levels of consumer inconvenience constitutes a "substantial governmental interest" justifying infringement of First Amendment rights.

Moreover, an accurate appreciation of the Government's real interest points the way to an obvious less restrictive alternative, namely, providing consumers with information and incentives to help them overcome their supposed lethargy and get the necessary equipment. In this respect, the Government's argument closely resembles the argument it made, and the Court rejected, in *Denver Area Educational Telecommunications Consortium*. There, the Government similarly urged that a cable lockbox is not an equally effective alternative to the "segregate and block" requirement of § 10(b) of the 1992 Cable Act, citing supposed consumer inconvenience (64 U.S.L.W. at 4714):

> In the case of lockboxes, parents would have to discover that such devices exist; find out that their cable operators offer them for sale; spend the time and money to buy one; learn how to program the lockbox to block undesired programs; and, finally, exercise sufficient vigilance to ensure that they have, indeed, locked out whatever indecent programming they do not wish their children to view.

Speaking for the Court, Justice Breyer rejected this argument, concluding that "the Solicitor General's list of practical difficulties would seem to call, not for 'segregate and block' requirements, but, rather, for informational requirements" directed at consumers and government mandates for improvements in equipment design. 64 U.S.L.W. at 4715.

The Court should make the same response to the Government's allegation of practical difficulties here. As Judge Williams stated in his dissent below, "[i]f Congress feared that consumers were insufficiently aware of [A/B] switches, * * * it could devise a promotional solution tailored to that end." J.S. App. 108a n.30. *See Turner Broadcasting System, Inc. v. FCC* ("*Turner I*"), 114 S.Ct. 2445, 2480 (O'Connor, J.) ("Congress can encourage the creation of * * * simple devices that would

let people easily switch from cable to over-the-air broadcasting"). One example would be a consumer-education program of the sort the FCC implemented in 1987. Another example would be equipment standards for television manufacturers designed to make switching as effortless as possible — *e.g.*, a mandate that most receivers contain built-in A/B switches operable by remote control. Congress in fact adopted similar requirements in the 1992 Act, directing the FCC to issue rules concerning "consumer electronics equipment compatibility." 47 U.S.C. § 544a(c).

For these reasons, the Government's allegations about consumer inconvenience would not justify the must-carry regime even if those allegations were plausible. But the evidence adduced to support them is in fact insubstantial. Nine years ago, the D.C. Circuit unanimously rejected the Government's assertions that "viewer lethargy" and "consumer ignorance" made the switch-and-antenna option unworkable. *Century Communications Corp. v. FCC*, 835 F.2d 292, 302 (D.C. Cir. 1987). As we demonstrate below, the evidence on remand confirms that the *Century* court was correct.

A. Practical Experience And Expert Testimony Confirm That A/B Switches Are Inexpensive, Easy To Install, And Convenient To Use

The evidence on remand conclusively established that A/B switches "work" in a technical sense, and the Government largely concedes this point. The Government tries lamely to retread decade-old arguments about "insufficient switch isolation" causing "signal leakage" and resultant picture-quality degradation (Govt. Br. 42-43). However, as we explained in our opening brief (at 26, 37-38), to the extent "signal leakage" was ever a meaningful problem it was solved by the FCC's promulgation in 1987 of more stringent performance standards for antenna-selector switches. Reluctant to impugn the FCC's technical prowess, the Government simply ignores our

argument as to the effect of the 1987 rulemaking. The Government's own expert admitted that he had no reason to believe that signal leakage is a problem in the real world today. J.A. 437-440. The evidence on remand was unanimous to that effect.

Having failed to prove that A/B switches do not work, the Government is forced to argue that consumers will not use them. At the threshold, this argument runs head-on into practical, real-world experience. As we explained in our opening brief (at 29-31), several million subscribers to DBS and MMDS service *currently use* A/B switches and antennas to watch local broadcast television over-the-air. *See Denver Area Educational Telecommunications Consortium*, 64 U.S.L.W. at 4711 (noting prevalence of DBS service). The Government's brief does not address this evidence.

Cable subscribers' willingness to use A/B switches is also shown by the Corpus Christi experience, which Judge Williams termed "a controlled experiment in consumer resourcefulness" (J.S. App. 105a). In late 1992, Corpus Christi cable subscribers successfully installed and used some 40,000 A/B switches on very short notice, with the result that broadcasters experienced no meaningful ratings decline during six weeks off cable. *See* DCI Br. 28-29. The Government dismisses this experience, noting that in Corpus Christi the three major networks were all dropped at about the same time. According to the Government, this evidence "proves little about cable subscribers' inclination to install antennas and use A/B switches * * * to *receive UHF independent stations* dropped from cable." Govt. Br. 43 (emphasis added).

This response speaks volumes about the Government's real objective in enacting must-carry. The Corpus Christi experience indisputably shows that cable subscribers are willing to incur the modest inconvenience incident to off-air reception of broadcasters *they genuinely want to see.* The

Government's concern is merely that consumers may demur to such efforts in the case of unpopular UHF stations *they have little or no desire to watch.* This confirms yet again what appellants have been contending all along. Congress's actual goal in enacting must-carry was not to preserve "free TV" or to safeguard the interests of TV viewers, but to subsidize marginal broadcasters who disdain the rigors of a free market in which cable subscribers, voting with their feet, may not bother to watch them.

Our opening brief addressed most of evidence the Government cites to support its theory that A/B switches are inconvenient to install or use. *See* DCI Br. 32-43. A short reply should therefore suffice:

• The Government cites a 1991 consumer survey by Mark Fratrick, NAB's in-house economist, as evidence that A/B switches are "unacceptable to consumers." Govt. Br. 43. In our opening brief (at 39-40 & n.8), we explained the deficiencies of the Fratrick survey and showed that, even with those deficiencies, it contradicts rather than supports Congress's conclusion that cable subscribers will not use A/B switches. The Government in its brief does not address our analysis of the Fratrick survey.

• The Government cites "evidence on remand," consisting of the Haakinson declaration, to support its argument that installation and use of A/B switches are "cumbersome and confusing." Govt. Br. 42 & n.41, 43 & n.42. In our opening brief (at 46-47 & n.10), we explained that Mr. Haakinson's expertise is limited to the science of radio signal transmission; he has no expertise in the field of consumer electronics. His resume discloses no experience or publications on this subject, and his deposition testimony revealed considerable ignorance about it. For example, asked how he determined the configuration of a "typical home TV system," Mr. Haakinson said his opinion was based "primarily just [on] discussions with

people at the local electronics store" and that he was acting "as a consumer, not as [an] electronic engineer." J.A. 421-423. The Government offers no response to our critique of Mr. Haakinson's credentials, and his hearsay declarations about A/B switches are entitled to no evidentiary weight.

• In a footnote, the Government cites Congress's assertion that A/B switches are inconvenient because they "generally cannot be operated with a remote control." Govt. Br. 42 n.41. In our opening brief, we showed that Congress was wrong. As Judge Williams explained, "[t]he record shows that most cable-ready TV receivers now on the market have built-in input selector switches operable by remote control." J.S. App. 104a. Stand-alone switches operable by remote control are also available for about $40. DCI Br. 25. The Government's brief simply ignores this evidence.

• As a further source of supposed inconvenience, the Government cites Congress's assertion that use of A/B switches may require consumers "to change the UHF channel settings on their televisions." Govt. Br. 42 n.41. The evidence on remand demonstrated that few TV viewers will ever need to change their UHF channel settings; when they do, they need only push a "tuning mode" switch operable by remote control. *See* DCI Br. 28-29. The Government's brief offers no response to this evidence.

• The Government cites a 1986 NCTA report submitted to the FCC alleging that installation of A/B switches involves "technical difficulties." Govt. Br. 42 n.41. The FCC specifically *rejected* this submission, stating: "those who contend that consumers cannot properly install switches present no credible evidence to support their claim." *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 2 FCC Rcd. 3593, ¶ 51 (1987), *granting reconsideration to* 1 FCC Rcd. 864 (1986). Plaintiffs' expert on remand confirmed the correctness

of that conclusion today, testifying that improper switch installation is a "statistically meaningless" problem. J.A. 508, 1779-1780. The Government offers no response to any of this evidence, which was set out in our opening brief (at 25-26).

The remaining "evidence" cited by the Government consists mostly of excerpts from submissions that appellee NAB and its allies made to the FCC in 1986-1987, coupled with quotations from broadcast industry witnesses reiterating the same points in congressional testimony. Govt. Br. 42 & n. 41, 43 & n.42 (citing JSCR). The Government cites this material for its sheer bulk, ignoring evidence on remand that showed it to be outdated, misleading, or simply wrong. *See* DCI Br. 35-41. Because the FCC and the D.C. Circuit in 1986-87 had embraced switch-and-antenna capacity as an alternative to must-carry, it is not surprising that the broadcast industry papered the 1992 legislative record rather thoroughly on this subject. The point of this Court's remand was to determine if this evidence, concededly bulky, was "substantial," a determination that entails primarily a *qualitative* inquiry. The remand proceedings showed the broadcasters' evidence to be of extremely poor quality, and the Government's repeated citation of this material does lighten its burden of proof.

B. Installation And Use Of Receiving Antennas Entail No Significant Cost Or Inconvenience

The Government's assertions about the deficiencies of television receiving antennas must surmount at the outset several common-sense hurdles. By its nature, the broadcast medium *presupposes* the use of receiving antennas to watch television. Broadcasters relied on receiving antennas to reach viewers for decades before the advent of cable. And 36 million U.S. households use antennas to watch television today. Standing alone, these facts suggest that receiving antennas are affordable and convenient, and that they work reasonably well.

The Government's argument fares no better when considered in detail. It first contends that "zoning ordinances and restrictive covenants often prohibit installation of [roof-top] antennas." Govt. Br. 41. But the Government has not shown this to be a meaningful problem: it made no effort to *quantify* the number of viewers affected by such restrictions, or the extent to which the restrictions take the form of outright bans (as opposed to height limitations or prior-approval requirements). Where roof-top installation is in fact prohibited, the evidence on remand showed that good-quality reception can still be obtained (a) by use of indoor antennas (amplified where necessary); (b) by installation of outdoor antennas in attics; or (c) by use of "master antennas" for apartment buildings and condominium complexes. *See* DCI Br. 27-28. Moreover, if Congress believes that local restrictions on roof-top antennas jeopardize the health of local broadcasting, it can preempt such restrictions, as the FCC has done in the case of restrictions on satellite dishes. *See* 47 CFR § 25.104 (1986); Notice of Proposed Rulemaking, *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59 (Apr. 27, 1995).

The Government next contends that cable subscribers will demur to the cost of installing antennas, which can range up to "$250 in some cases." Govt. Br. 41. This estimate assumes roof-top installation of the most expensive outdoor antenna by a professional installer. Many viewers can get good-quality reception from amplified indoor or attic antennas, which cost $40-$50 and can be self-installed. *See* DCI Br. 28. Even for roof-top installations, the evidence showed that outdoor antennas are available for as little as $15, and that professional installation may cost as little as $50. *Ibid.* Costs in this range do not represent a prohibitively high one-time charge for a cable household. Non-cable households — whom appellees repeatedly describe as less-affluent Americans — "somehow

manage[] the burdens of antenna ownership." J.S. App. 107a (Williams, J., dissenting). And several million DBS and MMDS subscribers willingly incur the cost of maintaining antennas, while simultaneously bearing installation and monthly charges for satellite service. Contrary to the Government's suggestion, the concept of "*free* broadcast television" (Govt. Br. 41) does not entail freedom from having to buy an antenna. Because the broadcast medium necessitates use of an antenna, quite the opposite is true.

Finally, the Government points out that antennas may be inadequate in some parts of the country, where "terrain interference or man-made obstacles" cause poor over-the-air reception. Govt. Br. 41-42. "[D]efendants have made no effort to quantify [such] weak-signal areas, which from all that appears may represent a very small fraction of the country." J.S. App. 109a (Williams, J., dissenting). But to the extent the Government's observation is true, it is irrelevant. As Judge Williams pointed out, "extending broadcast's reach to cable subscribers in otherwise signal-deprived areas" was not embraced by this Court in *Turner I* "as an interest substantial enough to justify must-carry." J.S. App. 108a.

Protecting the public's interest in "free TV" — by definition — means preserving the ability of TV households to view broadcasts *they can receive over-the-air*. Possible obstruction of over-the-signals by natural and man-made impediments is an immutable characteristic of the broadcast medium; it has been a fact of life for broadcasting since its birth.[1] The health of broadcasting, as a matter of law, is not affected by viewers'

---

[1] The Government contends that broadcast stations denied cable carriage in signal-deprived areas are somehow "worse off than they were before the advent of cable." Govt. Br. 42 n.40. This footnote is mystifying. Such stations are in *exactly the same position* they were in before the advent of cable, subject to the inherent limitations of the broadcast medium.

inability to view inherently non-viewable signals. And the existence of these obstacles does not constitute a "harm" to broadcasting that Congress could legitimately seek to cure by impairing cable speakers' First Amendment rights.

II. SECTION 5 OF THE ACT, CONFERRING MUST-CARRY RIGHTS ON PUBLIC BROADCASTERS, IS UNCONSTITUTIONAL

A. The Public Broadcasters Have Not Shown A Substantial Governmental Interest

Apparently emboldened by the Court's decision in *Turner I* not to apply strict scrutiny, the public broadcasters now defend § 5 on grounds that are in fact content-based. They contend that Congress has a substantial interest in promoting universal access to "the programming that is available only on public television — programming that for-profit, commercial stations either cannot or will not provide." Pub. Br. 38, *citing* H.R. Rep. No. 628, 102d Cong., 2d Sess. 73 (1992). They contend that public stations "fill special niches by focusing on areas such as instructional programming or programs tailored to minority audiences." Pub. Br. 25-26. And they contend that § 5 would be constitutional even under strict scrutiny "because the governmental interest in promoting the public education of its citizens is compelling." Pub. Br. 37 n.50.

The public broadcasters accordingly eschew reliance on various content-neutral rationales that Congress identified. They repeatedly emphasize that neither the viewership nor the financial soundness of public stations is a material factor in evaluating § 5. *See* Pub. Br. 15, 19, 25-26, 36-37. In their view, must-carry protection for public stations would be justified "even if the financial impact were minimal." Pub. Br. 40. The public broadcasters thus distance themselves from

Congress's stated goal of preventing jeopardy to the broadcast system.[2]

The public broadcasters also acknowledge that Congress's goal of preventing anticompetitive conduct has little application to them. Public stations do not advertise, and they accordingly do not compete with cable operators for advertising revenues. Appellees admit that "primary" public stations are almost invariably carried, and that noncarriage of second and third-tier public stations occurs because such stations are "far less economically attractive" to cable operators. Pub. Br. 25. That is so because (a) these secondary stations "have low viewership ratings," a function of their "niche programming" which lacks appeal for large audiences; and (b) the stations' noncommercial format precludes them from offering operators extra revenue in

---

[2] Because the public broadcasters' defense of § 5 does not hinge on proof of financial harm, their discussion of this point is half-hearted. They do not challenge our showing (DCI Br. 11-12) that the public broadcasting system was financially healthy during the period without must-carry, and they concede that no public station has ever gone dark, turned in its license, or ceased operations. Rather, they endeavor to show that these data, while true, are less suggestive of financial health than might be supposed. *See* Pub. Br. 33-34 & n.44 (asserting that some new stations were satellites of existing stations and that growth in viewer contributions reflected "more sophisticated fundraising techniques"). This rejoinder is based in part on the declaration of a CPB officer submitted with appellees' reply brief, and thus never subject to question on deposition. *See* Pub. Br. 33 (citing Coltman declaration). In any event, nothing in appellees' rejoinder suggests that public stations became *less* financially healthy during the period without must-carry rules. We addressed in our opening brief (at 13-14) the public broadcasters' speculative assertions about lost viewer contributions; the "hypothetical model" on this subject constructed by PBS officer Jonathan Abbott (Pub. Br. 32) was wholly discredited below. *See* DCI Opp. Mem., App. A. Similarly, appellees' assertion that they lost access to 10 million cable subscribers (Pub. Br. 26) — a number vastly in excess of their contemporaneous estimates during 1986-1991 — was shown below to be wildly inflated. *See* DCI Opp. Mem. 7-14.

the form of "ad avails." Pub. Br. 25-26. The public broadcasters thus acknowledge that cable operators' carriage decisions as to them reflect no anticompetitive animus, but a simple balancing of the operator's economic interests.[3]

In the absence of any applicable content-neutral rationale, the public broadcasters defend § 5 on grounds that necessarily entail reference to the content of their programming. Indeed, it is in emphasizing the limited attractiveness to most cable viewers of the "niche" programming offered by secondary public stations that appellees demonstrate their greatest First Amendment weakness. In effect, they contend that the preferences of the majority of cable subscribers, as well as the editorial choices of cable operators, should be subordinated to the interests of a small minority of public TV viewers by governmental fiat. Even though cable operators might make legitimate and rational economic decisions not to carry public stations with little audience appeal, appellees assert that Congress can *force* the carriage of such stations because of a legislative judgment that their "educational" and "noncommercial" programming is especially valuable.

This argument is inescapably content-based. It could as easily be applied to require newspapers to devote a fraction of

---

[3] In bemoaning their inability to compete with cable programmers for carriage by offering "ad avails" or other economic incentives, the public broadcasters fail to mention that it is Congress, not the cable industry, which has prohibited both commercial and public broadcasters from offering ad avails or paying for carriage (47 U.S.C. §§ 534(b)(3), 534(b)(10), 535(g) and 535(i)(1)), and the FCC which prohibits public broadcasters from accepting advertising (47 C.F.R. §§ 73.621(d)-(e)). As Judge Williams observed, "To whatever extent broadcasters are competitively hobbled by [Congress's] ban on ad avails, * * * they cannot rely on it to justify the constitutionality of [must-carry]. The government surely does not have a 'substantial interest' in remedying a competitive distortion that arises entirely out of a detail in its own purportedly remedial legislation." J.S. App. 84a.

their daily pages to "non-commercial educational" feature stories; to require movie theaters to devote one day a week to free showings of "non-commercial educational" movies; or to compel bookstores to devote 10% of their shelf space to "non-commercial educational" works by academic authors. Such requirements, although "viewpoint neutral," would clearly be content-based and could not conceivably pass muster under this Court's First Amendment precedents.

Apparently concerned that commercial broadcasters' must-carry protection might not survive appellants' evidentiary showing on remand, the public broadcasters have chosen to articulate a separate defense of § 5. This separate defense is founded on a presumed governmental preference for public stations' programming, which is assertedly "unique" and "critical to underserved audiences." Pub. Br. 25, 38. But promoting "universal access" to marginally attractive niche programming by public broadcasters has nothing to do with the legislative goal hypothesized by this Court in *Turner I*, namely, protecting the local broadcast system against the threat of unfair competition from cable systems. And because appellees' separate defense is irretrievably content-based, it cannot save § 5 from invalidation under the First Amendment.

B. Section 5 Is Not Narrowly Tailored

At bottom, the public broadcasters' complaint is that their limited financial resources and noncommercial status prevent them from offering economic incentives to induce cable operators to carry the worthy, but relatively unpopular, programming they supply. They accordingly seek mandatory carriage as a form of public subsidy. Congress is, of course, free to subsidize public broadcasting through the appropriations process. But Congress may not, consistently with the First Amendment, conserve funds and accomplish the subsidy by burdening cable speakers' First Amendment rights.

The public broadcasters advance two reasons why a congressionally-appropriated subsidy is not an acceptable "less restrictive alternative" to the must-carry regime. First, they contend that "money simply cannot replace viewer access — a fundamental congressional interest." Pub. Br. 46. But this rejoinder misses the point: money can be used to *buy* access. With additional funds appropriated by Congress, public stations could offer incentives to make themselves "economically attractive" to cable operators. *See* Pub. Br. 25. Or they could ensure their access to cable viewers by securing carriage on a leased access channel.

Second, appellees contend that a fiscal subsidy is not "as effective as a must-carry requirement" because "it is most unlikely that Congress would grant additional funds to public television at a time when there is intense pressure to reduce substantially and ultimately terminate the basic federal grants public broadcast stations receive." Pub. Br. 46-47. But if Congress declines to provide enough support to ensure the survival of relatively unpopular niche public programming, it simply proves that appellees have exaggerated the legislative commitment to the goal of "universal access" for public stations. At all events, if Congress is unwilling to subsidize public broadcasters at taxpayers' expense, the First Amendment prevents Congress from subsidizing them at cable speakers' expense, using comandeered cable channels as a form of substitute currency.

CONCLUSION

For these reasons and those stated in our opening brief, the judgment of the three-judge district court should be reversed, and §§ 4 and 5 of the 1992 Cable Act should be declared unconstitutional.

Respectfully submitted,

ALBERT G. LAUBER, JR. *
PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE, CHTD.
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
(202) 862-5000

Of Counsel:

JUDITH A. MCHALE
MARK HOLLINGER
DIANE L. HOFBAUER
DISCOVERY
COMMUNICATIONS, INC.
7700 Wisconsin Avenue
Bethesda, MD 20814
(301) 986-1999

* *Counsel of Record*

Dated: July 17, 1996